IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 4412 OF 2006
IN
ARBITRATION PETITION NO. 543 OF 2006.

Jayesh M.Gandhi and others. ... Petitioners.
Versus.
Yogendra N.Thakkar and others. ... Respondents.

Shri Paritosh Jaiswal with Shri Deepak Desai i/by M/s.Kanga & Co. for the Petitioners.

Shri N.C.Parekh i/by M/s.Mansukhlal Hiralal & Co. for the Respondents Nos.1 and 2.

CORAM : ABHAY S.OKA, J.

DATED : 16th July, 2007.

P.C.:

1. I have heard the submissions of the learned Counsel appearing for the parties on Friday 13th July 2007. This Notice of Motion has been taken out by the 1st and 2nd Respondents in Arbitration Petition No.543 of 2004. The prayer made in this Notice of Motion is for a direction to the Prothonotary & Senior Master to launch prosecution against the Petitioners for offence committed by them under sections 191, 192, 193, 196 and 209 of the Indian Penal Code read with section 195 of the Code of Criminal Procedure, 1973.

2. In the affidavit in support of this petition a reliance has been placed on the following averments made by the Petitioners in the Arbitration Petition No.543 of 2004:

> "The Petitioners and Respondent Nos.1 to 3 carry on business as Chartered Accountants in the firm name and style of Messers.N.M.Raiji and Company (hereinafter referred to as "the said firm") as partners thereof, except that Respondent No.1 has been suspended as a partner. The said Deed of Partnership executed in respect of the said partnership is dated 24th April 2000. Hereto annexed and marked Exhibit "A" is a copy of the said Deed of Partnership dated 24th April 2000."

The present Notice of Motion also relates to the allegation made in paragraph 9 of the affidavit-in-reply filed by the Petitioners in the Arbitration Petition to the Contempt Petition No.217 of 2006. The said paragraph reads thus:

> "The Petitioners and Respondent Nos.1 to 3 carry on business as Chartered Accountants in the firm name and style of Messers.N.M.Raiji and Company (hereinafter referred to as "the said firm") as partners thereof, except that Respondent No.1 has been suspended as a partner. The said Deed of Partnership executed in respect of the said partnership is

dated 24th April 2000. Hereto annexed and marked Exhibit "A" is a copy of the said Deed of Partnership dated 24th April, 2000".

The case made out is that the Petitioners are guilty of dishonestly making a statement that the Respondent No.1 to the Arbitration Petition is a "suspended partner" and the said allegation is false to their knowledge.

3. The learned Counsel appearing for Respondents Nos.1 and 2 in support of the Notice of Motion has taken me through various affidavits and the relevant documents. He also invited my attention to the letter dated 1st October 2003 sent by the Advocate for the Petitioners to the 1st Respondent. He invited my attention to the material portion of the affidavit-in-reply and submitted that the only explanation offered by the Petitioner is that the term "suspended partner" is badly lifted from the letter dated 1st October 2003 sent by the Advocate for the Petitioners.

4. The learned Counsel appearing for the Petitioners in the Arbitration Petition submitted that no case is made out for issuing a direction to the Prothonotary & Senior Master for instituting the prosecution.

5. I have carefully considered the submissions. It must be noted here that the arbitration petition has been disposed of by an order passed by consent of the parties. Moreover the contempt petition No.217 of 2006 is already disposed of by this Court.

6. It is pointed out in the affidavit-in-reply to this Notice of Motion that the term "suspended partner" is badly lifted from the letter dated 1st October 2003. It will be necessary to refer to the said letter. In the said letter sent by the Advocate for the Petitioners to the Respondent No.1, in paragraph 49 it is alleged thus:

> "49. In the further premises, our clients as partners of N.M.Raiji & Co. state that:
>
> (a) Your said acts of continuing misconduct, disobedience and defamation have created an emergency. You are posing a serious risk to the practice of the office and to the firm's revenue. You are invading our client's and the firms' valuable rights to practice;
>
> (b) Our clients and the partners of the firm

sincerely believe that when you as a professional have made allegations of theft/fraud and forgery etc. against your elder brother and have prayed for reliefs accordingly against him and others then you are capable of resorting to any means to serve your own purpose;

(c) Our clients are justifiably convinced that if you are allowed to continue as a partner, you will cause further and irreparable damage to the firm of M/s.N.M. Raiji & Company and to its partners. It will then not be possible to establish status quo ante if you are allowed to continue as a partner;

(d) After due deliberation our clients partners of N.M.Raiji & Co., hereby exercise the authority vested in them under section 21 of the Indian Partnership Act, 1932 read with the said Clause 11. **As persons of prudence and to prevent the firm from suffering further loss and to arrest your continuing acts of misconduct hereby suspend you from functioning or representing yourself as a partner of**

M/s.N.M.Raiji & Co., with immediate effect until you reimburse the firm in the said sum of Rs.7 Crores as above;" (Emphasis is added).

In paragraph 50 of the said letter the Advocate for the Petitioners have stated that to obviate any technical objection an opportunity is given to the Respondent No.1 to give written explanation to the Petitioners within a period of one week from the date of receipt of the letter failing which he would be suspended as a partner. In paragraph 51 of the said letter, it is stated thus:

"51. Pending such explanation and payment:

(a) Our clients hereby temporarily suspend you as a partner of the firm of M/s.N.M.Raiji & Co. and call upon you not to perform any act as a partner of the firm. Our clients also call upon you not to represent to the public at large that you are a partner of the firm."

7. According to the case made out by the 1st and 2nd Respondents in support of this Notice of Motion, the offences allegedly committed by the Petitioners are under section 191, 192, 193, 196 and 209 of the Indian

Penal Code. Section 191 of the IPC deals with giving of false evidence on oath. Section 192 deals with fabrication of false evidence which includes causing any circumstance to exist or making a false entry in any book or record or electronic record or making any document or electronic record containing a false statement with an intention that such false entry or false statement may appear in evidence in a judicial proceedings and that such circumstance, false entry or false statement, so appearing in evidence may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the proceedings. Sections 193 and 194 are the sections prescribing punishments. Section 196 provides that whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated is liable to be punished under section 195. Section 209 deals with the false claim made in the Court fraudulently or dishonestly or with intent to injure or annoy any person knowing that the said claim is false.

8. In the present case, the case made out by the Petitioners is based on a purported suspension of a partner from the partnership firm. The claim of the Petitioner in the legal notice sent by their Advocate is that they have a right to suspend the Respondent No.1

and they have suspended the Respondent No.1 as set out in the letter. The alleged suspension is in purported exercise of the authority under the provisions of the Indian Partnership Act, 1932 and clause 11 of the Deed of Partnership. On a plain reading of the averments made in the affidavit-in-support, it is obvious that by no stretch of imagination a case is made out as regards commission of any of the aforesaid offences. Prima facie, ingredients of none of the aforesaid offences are established. Hence no case is made out for initiating a prosecution.

9. There is no merit in the Notice of Motion and the same is dismissed.

Judge.